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In the Supreme Court of the United States

OCTOBER TERM, 1959

NO. 130

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Petitioner,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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INDEX

	Page
Citation to Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Questions Presented	2
Statement of the Case	4
Summary of Argument	5
Argument	7
1. The Statute Under Which Petitioner Was Ordered Deported Is Unconstitutional	7
2. The Evidence Shows that the Alleged Membership of the Petitioner in the Communist Party Was Not a Meaningful Political Association Under the Rule of *Rowoldt v. Perfetto*	17
Conclusion	19

AUTHORITIES CITED

Page

Cases

American Communications Association, CIO v. Douds, 339 U.S. 382 (1950) 6, 13

Bridges v. Wixon, 326 U.S. 135 (1945) 12

Cooper v. Telfair, 4 Dall. 14 (1800) 8, 10, 15

Cummings v. Missouri, 4 Wall. 277 (1866) 10, 12

Ex Parte Garland, 4 Wall. 333 (1866) 10

Galvan v. Press, 347 U.S. 522 (1954) 3, 6, 7, 11

Harisiades v. Shaughnessy, 342 U.S. 580 (1952) 6, 7, 11

Lem Moon Sing v. United States, 158 U.S. 538 (1895) 15

Ng Fung Ho v. White, 259 U.S. 276 (1922) 12

Rowoldt v. Perfetto, 355 U.S. 115 (1957) 3, 6, 17

Sleight v. Kane, 2 Johnsons Cases 236 (Supreme Court, New York) 9

United States v. Lovett, 328 U.S. 303 (1946) 10

United States ex rel. Klonis v. Davis, 13 F.2d 630 (CA 2, 1926) 12

Wong Wing v. United States, 163 U.S. 228 (1896) 15

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 15

Constitution and Statutes

United States Constitution, Article I, Section 9, Clause 3 ..... 2, 7

United States Constitution, Article I, Section 10 9

8 U.S.C. 1251 (a) (6) (C) 2, 3

8 U.S.C. 1252 (b) (4) 2, 6, 18

28 U.S.C. 1254 (1) 2

New York, Act of Oct. 22, 1779 9

AUTHORITIES CITED (Cont.)

Page

MISCELLANEOUS

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PETITIONER'S BRIEF ON THE MERITS

CITATIONS TO OPINIONS BELOW

The oral opinion of the United States District Court for the District of Oregon was rendered on the 14th day of April, 1958, and appears at page 81 of the record. The opinion of the United States Court of Appeals for the Ninth Circuit is dated April 6, 1959, and is reported at 265 F2d 825.

JURISDICTION

The jurisdiction of this Court in invoked under 28 U.S.C. 1254 (1). The judgment of the Court of Appeals was entered on April 6, 1959 (R. 101) and a timely petition for rehearing was denied on May 19, 1959 (R. 102). The petition for certiorari was filed on June 20, 1959 and granted by this Court on October 12, 1959.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the application of the following provision of the United States Constitution:

> Article I, Section 9, Clause 3: "No Bill of Attainder or ex post facto Law shall be passed."

The constitutionality of the following statute is involved:

> 8 U.S.C. 1251 (a) (6) (C): "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> ". . . aliens who are members of or affiliated with (i) the Communist Party of the United States."

Application of the following statute is involved:

> 8 U.S.C. 1252 (b) (4): ". . . no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

QUESTIONS PRESENTED

Petitioner was born in Finland in 1908 and entered this country less than a year later. He has been ordered

deported on the ground that he allegedly was a member of the Communist Party of the United States during the years 1937-39, and his application for suspension of deportation was denied by the Board of Immigration Appeals. On a previous proceeding testing the validity of the Government's refusal to suspend deportation, whether or not there was reasonable, substantial and probative evidence that Petitioner was a member of the Communist Party within the meaning of *Galvan v. Press,* 347 U.S. 522, and whether or not the Act under which the Government seeks to deport Petitioner (8 U.S.C. 1251 (a) (6) (C)) is a violation of the Constitution of the United States, the deportation order was sustained. 148 F.S. 106, 241 F. (2d) 938, certiorari denied December 16, 1957, 355 U.S. 905.

The questions presented in this Petition are:

1. Whether 8 U.S.C. 1251 (a) (6) (C) violates the Constitution of the United States by reason of

(a) being a Bill of Attainder;

(b) being an Ex Post Facto Law;

(c) violating Due Process of Law; and

(d) infringing on freedom of speech.

2. Whether the Petitioner's alleged association with the Communist Party, on the record of this case, was "meaningful" and "political" within the rule of *Rowoldt v. Perfetto,* 355 U.S. 115.

STATEMENT OF THE CASE

Petitioner* and his parents have resided in the United States since 1909 and in Portland, Oregon for about 33 years where Petitioner is a house painter.

Petitioner is the only surviving son of his parents, a brother having been killed during World War II on a ship near Wake Island (Tr. 172). He was drafted in 1944 and served 95 days in the Army, and received an Honorable Discharge for medical reasons (Tr. 8, 9).

On June 17, 1952, a warrant for the arrest and deportation of Petitioner was issued by the Immigration Service and was served upon him on or about September 12, 1952. In the warrant, it was alleged that Petitioner was a member of the Communist Party after entry into the United States from 1937 to 1939.

The Government's case was based upon testimony of two witnesses, Walter R. P. Wilmot and Lee Arthur Knipe. The Board of Immigration Appeals discounted the testimony of Knipe because he had lied during this and other hearings by denying a prior criminal conviction in California. Wilmot admitted that at the time Petitioner was alleged to be a Communist, he himself was a very heavy drinker (Tr. 49, 50).

Petitioner did not testify at the deportation hearing but on the hearing of his application for suspension of deportation, he denied that he was a Communist Party member at any time (Tr. 203, 204).

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* The Transcript of the hearings before the Immigration Service will be referred to as "(Tr. —)", and the record made in the District Court will be referred to as "R. —)".

Wilmot and Knipe both testified that they were active card-carrying members of the Communist Party during 1937 to 1939 and that Petitioner was also a card-carrying member during this period. They both asserted that they saw Petitioner pay his dues at the Party office and receive stamps to be put in his membership book, which they also claimed to have seen (Tr. 14-15, 46, 69). Wilmot, the then editor of the "Labor New Dealer", a CIO newspaper, testified that Petitioner assisted in the distribution of this newspaper once or twice a month (Tr. 15, 17, 19-20). Wilmot also swore that Petitioner participated in closed discussion of Communist Party policies and the circulation of the Labor New Dealer in the back room of Wilmot's office (Tr. 20-22). Both Knipe and Wilmot stated that they saw Petitioner at many closed Party meetings in Portland (Tr. 15, 17, 67) and Wilmot said that Petitioner attended an out of state "plenum" (Tr. 26). Wilmot asserted that Petitioner belonged to the "top fraction" of the Communist Party and "knew where he was going" (Tr. 27-32). Knipe testified that Petitioner served on the Executive Board of the Area Branch (Tr. 68).

Petitioner was and apparently still is ignorant of Communist history and theory, even according to the Government witnesses (Tr. 70-75, 201, 202; R. 61, 62).

SUMMARY OF ARGUMENT

The portion of the McCarran-Walter Immigration Act under which the Government seeks to deport Petitioner is unconstitutional as a Bill of Attainder because

the Constitutional prohibition against Bills of Attainder is an absolute restriction on the power of Congress, without any exception in deportation cases. The Act in question is a Bill of Attainder because it imposes a penalty on easily ascertainable members of a group without judicial trial.

Deportation is a penalty or punishment within the bar against Bills of Attainder, and Petitioner is protected even though he is an alien.

Since the Act operates as a penalty for past conduct, it is a Bill of Attainder within the definition of *American Communications Association, CIO v. Douds,* 339 U.S. 382 (1950).

The Court can hold the Act unconstitutional without overruling its precedent in *Galvan v. Press,* 347 U.S. 522, and *Harisiades v. Shaughnessy,* 342 U.S. 580.

Furthermore, Petitioner is not deportable because the evidence fails to disclose that he had a meaningful political association with the Communist Party as required in *Rowoldt v. Perfetto,* 355 U.S. 115, because it only tends to prove that Petitioner paid dues and attended various meetings of the Communist Party. The witnesses against the Petitioner are also not worthy of belief and because of this fact, the evidence against Petitioner is not "substantial and probative" as required by 8 U.S.C. 1252 (b) (4).

ARGUMENT

1. The Statute Under Which Petitioner Was Ordered Deported Is Unconstitutional.

In *Galvan v. Press,* 347 U.S. 522, and *Harisiades v. Shaughnessy,* 342 U.S. 580, all Constitutional issues were decided against the aliens involved, except the question of whether the Act is a Bill of Attainder. Because of this fact, this brief will be confined to the Bill of Attainder issue and whether Petitioner is deportable under *Rowoldt v. Perfetto,* 355 U.S. 115.

Article I, Section 9, Clause 3 enjoins Congress from passing a Bill of Attainder. It is unqualified and without exception.

Bills of Attainder were well known and recognized in England for many centuries prior to the colonization of America and the reception of the common law in what is now the United States. They were enacted by Parliament from time to time to deal with serious political questions, and often to eliminate political offenders.

> "One abuse of fair procedure which died out only very slowly in England and America was a simple legislative enactment declaring a man guilty of some heinous offense—usually treason—and arbitrarily imposing some punishment upon him, commonly death and the forfeiture of all property, without the formality of a trial. Bills of Attainder were still fairly common during the political disturbances of the 17th century. Thus in 1641, the Parliament arbitrarily adjudged the Earl of Strafford to be attainted of high treason and condemned him to suffer death and forfeiture of his entire estate. Again, after the Restoration in 1660, the Par-

liament dominated by Charles II and his henchmen voted Bills of Attainder against certain of the followers of Oliver Cromwell." (Alfred H. Kelly, *Where Constitutional Liberty Came From,* 1954, Carey Chapman Catt Memorial Fund, Inc., p. 20-21).

As Cooley has pointed out, in addition to Bills of Attainder there were also enactments called "Bills of Pains and Penalties," which differed from the Bills of Attainder only in that the punishments imposed were less than death. (The General Principles of Constitutional Law, 1931, 4th Ed., p. 355.)

Bills of Attainder were used in several American colonies during and after the Revolutionary War as measures against those who remained loyal to Great Britain. For instance, the Act of the New York Legislature of October 1779 declared the Earl of Dunmore, the former Governor of New York, and some forty-seven other people to be guilty of treason, declared all of their property confiscated to the State of New York, and banned them under penalty of death should they ever return. (See: Alfred H. Kelly, Where Constitutional Liberty Came From, 1954, pp. 20-21.)

Indeed, this Court held in *Cooper v. Telfair,* 4 Dall. 14, that a state legislature had the power to pass a Bill of Attainder before the adoption of the United States Constitution, unless it was restrained by the state constitution.

In that case, it was said that a Bill of Attainder is a political act and the power to pass it is inherent in the sovereignty of a state.

The aforementioned New York Bill of Attainder of October 22, 1779, was involved in the case of *Sleight v. Kane,* 2 Johnsons Cases 236 (Supreme Court, New York), in which it was held that a British subject whose estate was forfeited to the State of New York pursuant to the Bill of Attainder could not maintain a counter-claim for rent in an action on a promissory note.

For similar enactments see 2 Belknap, History of New Hampshire (1912), and 2 Story, Commentaries on the Constitution (1891, 5th Ed.), page 217, note 5a.

The last cited authority states the general attitude of the colonists towards Bills of Attainder once the pressures of the Revolutionary War had passed away.

> "The injustice and inequities of such acts, in general, constitute an irrestible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens." (p. 217)

Not only did the Constitutional Convention bar Congress from passing Bills of Attainder, it placed a similar impediment on state action. Article I, Section 10. No less an authority than James Madison, the "Publius" of the Federalist papers, described Bills of Attainder as being "contrary to the first principles of the social contract, and to every principle of sound legislation." (The Federalist No. 44, Modern Library Edition, page 291.)

The weight of authority, both judicial and scholarly, supports the proposition that Congress has no power to pass a Bill of Attainder of any kind or nature, or for

any purpose whatsoever. This Court has implied in *Cooper v. Telfair,* 4 Dall. 14, that even in the exercise of sovereign authority, a Bill of Attainder passed after the enactment of the United States Constitution would be invalid.

In considering whether the Act in question is a Bill of Attainder we refer to this Court's definition in *U. S. v. Lovett,* 328 U.S. 303:

> "They [the Cummings and Garland cases] stand for the proposition that the legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial are Bills of Attainder prohibited by the Constitution." (328 U.S. at 305)

Section 1251 (a) (6) (C) possesses all of the attributes of a Bill of Attainder described in *Lovett, Cummings* and *Garland.* It imposes a penalty of deportation upon members of a named and ascertainable group, namely alien members of the Communist Party, and it does so without judicial trial.

That the individual aliens, the objects of Congressional action, were not specifically named makes no difference whatsoever. In both *Ex Parte Garland,* 4 Wall. 333, and in *Cummings v. Missouri,* 4 Wall. 277, the invalid acts were directed at unnamed members of groups, specifically those who had participated in the Civil War on the side of the Confederacy. In both cases the Court struck down restrictions on preaching and the practice of law by those who could not take the required oath of non-involvement on behalf of the Con-

federacy. It should be carefully noted that in neither *Garland, Cummings* nor *Lovett* were the penalties imposed "criminal punishments."

In the case of *Lovett,* he and other named persons were deprived of their salaries, while in *Cummings* and Garland, the aggrieved parties were denied the right to practice their professions.

We are surprised to learn of the confusion in the minds of Government counsel as manifested in their Brief in Opposition to the Petition for Certiorari in this case, as to the distinction between Ex Post Facto Laws and Bills of Attainder. In arguing that this Court's decisions in *Galvan v. Press,* 347 U.S. 522, and *Harisiades v. Shaughnessy,* 324 U.S. 580, are dispositive of the Bill of Attainder issue, even though not mentioned in the opinions, the Government apparently assumes that because the Ex Post Facto clause has no application to deportation, neither does the Bill of Attainder clause.

Nothing could be further from the truth. The two clauses refer to distinct kinds of legislation and were placed in the Constitution to remedy two different evils. There has never been a requirement that an Act impose "criminal punishment" for it to qualify as a Bill of Attainder. This is shown conclusively by *Lovett, Garland* and *Cummings.* It is clear that any deprivation of any right, privilege, or salary, by legislative enactment in the nature of a Bill of Attainder is the evil at which the Constitutional prohibition is aimed.

Certainly if the deprivation of a salary in *Lovett,*

or the right to practice law or preaching in *Garland* and *Cummings*, are penalties, deportation is in this category.

There is considerable authority to the effect that deportation does inflict literal punishment and constitutes in law a deprivation of rights and privileges.

> "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in the land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted." *Bridges v. Wixon,* 326 U.S. 135, 154.

Judge Learned Hand in *United States Ex Rel Klonis v. Davis*, 13 F.2d 630, in speaking of an alien long resident here who was about to be deported following conviction for a crime, characterized deportation as "dreadful punishment." Deportation in general, and in the case at bar in particular, separates the alien from his American family and from his friends. It removes him from his home and returns him to a strange land where he is without friends, without family and without employment. In short, it deprives him of what Justice Brandeis once called "all that makes life worth living." *Ng Fung Ho v. White,* 259 U.S. 276, 284.

Finally, this Court has stated the policy of the Constitution in clear and unequivocal terms through Mr. Justice Field in *Cummings v. Missouri,* supra, at pages 321-322:

> "The theory upon which our political institutions rest is that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all

> avocations, all honors, all positions are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined."

American Communications Association, CIO v. Douds, 339 U.S. 382 (1950), carefully distinguished between Bills of Attainder such as passed in *Lovett, Garland* and *Cummings* from the Section 9(h) of the Taft-Hartley Act which barred the NLRB from acting on complaint of unions who had not filed officers' non-Communist affidavits.

The Court said that the Taft-Hartley Act was not a Bill of Attainder because it was a legitimate classification and regulation of union officers who might be sympathetic to the Communist cause. The Court said, referring to *Lovett, Garland* and *Cummings*:

> "Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there is a decisive distinction: In the previous decisions individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the Congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that Section 9(h) is intended to prevent future action rather than to punish past action." 339 U.S. at 413-414.

It is evident from *Douds* that had the Taft-Hartley

Act operated retrospectively rather than prospectively, it would have fallen within the bar against Bills of Attainder.

That the Act in question here operates as a punishment for past action is too clear for anyone to dispute. Indeed there is no evidence in the record that this Petitioner poses any threat to the United States by his continued residence here. As a matter of fact, he has lived a creditable life, contributing his best in war and peace. The entire basis for deportation here is an alleged association twenty years ago. Such association demonstrates no relationship to future conduct on the part of Petitioner, nor to his entry into the United States. It must be recalled that Petitioner was a child of less than one year of age when he came to this country. His conduct in 1937 and 1939 could hardly have been related to his entry, and twenty years later it can hardly be said to form the basis of a judgment as to any peril to the United States which would arise from his continued presence within this country.

If the classification of persons in *Douds* was a reasonable exercise of Congressional judgment, the same cannot be said for the Act in question. It has been said that the power to deport is implied from the sovereign power of the United States to control the entry of aliens into its territory. If so, the basis of deportation here is so remote from the entry of this Petitioner into this country that there is no causal connection whatsoever.

If it is to be argued that the standards of the Constitu-

tion with respect to Bill of Attainder cast no protection over aliens who reside here, we can only refer the Court to its decisions in such cases as *Lem Moon Sing v. United States*, 158 U.S. 538; *Wong Wing v. United States*, 163 U.S. 228; *Yick Wo v. Hopkins*, 118 U.S. 356. The Court has repeatedly declared that an alien lawfully here is entitled to the same Constitutional safeguards to protect his life, liberty and property as a citizen.

> "His personal rights when he is in this country . . . are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States." *Lem Moon Sing v. United States*, 158 U.S. 538, 547.

As we have pointed out, Bills of Attainder against aliens were well known before the Constitution, and the prohibition against them contained in the supreme law of the land is by its terms absolute and unqualified. This Court in *Cooper v. Telfair*, 4 Dall. 14, implied that had the Bill of Attainder passed by the Georgia Legislature been enacted after the approval of the United States Constitution, it would have been invalid. This, regardless of the fact that the law was passed pursuant to the inherent or sovereign power of the state legislature.

The Constitution did not except aliens from the protection of the ban on Bills of Attainder; indeed, its range is as broad as the territory of the United States. It is significant that the prohibition against Bills of Attainder is included in Article I among the many other restrictions on the powers of Congress. Congress can

legislate only where power is delegated to it. Where it is expressly denied, it may not act at all.

We suggest that there has been no showing whatever of extraordinary circumstances which justify suspension of a basic Constitutional safeguard such as the Bill of Attainder clause. There is no war emergency; there is no threat of revolution. There is no evidence in this case that this Petitioner ever committed a single overt act against the best interests of the United States of America. On the contrary, his loyalty and devotion is unquestioned. Yet the blind, narrow, fanaticism which underlies the McCarran-Walter Immigration Law has been put into motion by Governmental authorities who have been willing to spend literally thousands of dollars over several years in an attempt to deport this harmless person to a far-off country which he does not even remember. One is compelled to wonder what dangers will be avoided, or what bureaucratic satisfactions will be gratified should Petitioner be finally deported.

As we suggested in the Petition for Certiorari, the time has come to cast the protection of this Court about not only this Petitioner but around all aliens who have been the object of politically inspired hysteria and abuse.

Banishment is a brutal thing; this Court is the great bulwark against such excesses. The liberties of all Americans, citizens and aliens alike, lie in the palm of this Court's steady hand. Not only humanity but the basic foundation of a free way of life as outlined in

the Constitution cry out for the Court to condemn an Act which has repelled most Americans and has caused this country to be ridiculed and scorned abroad.

In order to strike down the Act, this Court need not overrule *Galvan* and *Harisiades*. It need only follow the logic of precedent and the plain meaning of the Constitution and hold that the Act is a Bill of Attainder.

2. The Evidence Shows That The Alleged Membership Of The Petitioner In The Communist Party Was Not A Meaningful Political Association Under The Rule Of Rowoldt v. Perfetto.

We know this Court will carefully examine the record to determine if the facts in this case meet the statutory requirement of "substantial and probative" evidence that the alien has had a meaningful association "not wholly devoid of political implications."

The nub of Petitioner's case is that in *Rowoldt,* an alien was not held to have had a meaningful political association with the Communist Party after admitting that he had attended Communist Party meetings, paid membership dues, and worked in a Communist Party bookstore in which Marxist and Communist literature was sold. Rowoldt demonstrated a high degree of sophistication concerning Communism and the history of the Russian Revolution. (355 U.S. 116-118, 120, 129-130)

He testified that he joined the Communist Party for economic reasons during the depression (355 U.S. 117-118).

In the case at bar, Petitioner vigorously denied mem-

bership in the Communist Party (Tr. 198, 203, 204, 220; R. 54), and the most evidence against him that could be gleaned from two highly untrustworthy witnesses was that he was alleged to have attended Communist Party meetings, paid dues, helped circulate a labor newspaper, and attended perhaps one out of state meeting.

The Court of Appeals in its decision places considerable stress upon the alleged leadership role of the Petitioner, and the testimony that he belonged to "the top fraction" of the Party. But a close reading of this testimony indicates that this term was not explained. For all anyone knows, it is without substance. It should be emphasized that while one witness, Wilmot, testified that Petitioner was a "functionary" (Tr. 15) the other witness, Knipe, denied it (Tr. 68).

We know that both of these witnesses were untrustworthy and wholly unsatisfactory but how strange it is for the Government to insist that its case has been proved when they contradict one another in such an important matter.

Unfortunately many reviewing courts, including the Court of Appeals in this instance, have failed to apply the clear requirements of 8 U.S.C. 1252 (b) (4) that evidence to support deportation must be "substantial and probative", to the facts of each case. Instead they merely ask if there is any evidence to support the administrative findings and if so their review is closed without any appellate evaluation of the truthfulness or reliability of witnesses.

We suggest that Courts of Appeal should exercise more independent judgment in these cases. Great issues are at stake for the individuals involved and for the freedom of this country in general. The courts should recognize that these hearings are held in the Immigration Department where the hearing officers are part and parcel of the machinery of deportation. They must realize that there is little or no independent judgment on these cases at the administrative level. It is up to the Courts to see that the standards of the Act, such as they are, are carefully applied and where a court will not re-examine the credibility of witnesses or the sufficiency of the evidence, then basic rights have been denied to this Petitioner and many other aliens.

It is perfectly clear that here Petitioner was and apparently still is grossly ignorant of Communist history and theory (Tr. 70, 75, 201, 202; R. 61-62). There is no evidence whatsoever in the record that if Petitioner was a member of the Communist Party he was aware and interested in its political as distinct from its economic and welfare activities. If Rowoldt, a relatively sophisticated and informed person who had worked in a Communist Party bookstore, should be protected from deportation then surely Petitioner is entitled to the same relief.

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment and remand the case for dismissal of the deportation proceedings lodged against

him. If the Court does not choose to rule on the Constitutional issue of "Bill of Attainder" it can dispose of this case in the interests of justice by finding that the evidence of the two unreliable Government witnesses is wholly inadequate to meet the standards of the Act which require "substantial and probative evidence" to support an order of deportation.

Respectfully submitted,

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